

MISSISSIPPI SUPREME COURT DECISIONS – MARCH 15, 2018***SUPREME COURT - CIVIL CASES*****ESTATE OF PUCKETT V. CLEMENT****CIVIL - WILLS, TRUSTS, & ESTATES**

CIVIL PROCEDURE - AFFIRMATIVE DEFENSES - WAIVER - A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver
INTENTIONAL TORTS - ASSAULT & BATTERY - STATUTE OF LIMITATIONS - Miss. Code Ann. § 15-1-35 provides that all actions for assault or assault and battery shall be commenced within one year next after the cause of such action accrued, and not after

STATUTE OF LIMITATIONS - SERVICE OF PROCESS - GOOD CAUSE - To establish good cause the plaintiff must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice; good cause can never be demonstrated where plaintiff has not been diligent in attempting to serve process

FACTS

Carol Clement asserted that Russell Puckett told her that she could have the two planters on his front porch when he either passed away or closed his antique store. Clement alleged that she had knocked on Puckett's door and rung his doorbell on a number of occasions without receiving a response. Assuming Puckett had passed away, Clement, with the assistance of her daughter, removed one of Puckett's planters from his porch and began to carry it toward her nearby home. While crossing the street with the planter between them, Puckett fired four shotgun rounds behind them and fired two additional shots in a direction unknown. Clement filed suit against Puckett on June 11, 2010. Puckett died in 2014. Puckett's Estate moved to dismiss the suit due to failure to timely serve process under Miss. R. Civ. P. 4(h). The trial court denied the motion to dismiss. Puckett's Estate appealed.

ISSUES

Whether (1) Puckett's Estate waived its statute-of-limitations defense; (2) Clement's claims are subject to a one-year statute of limitations; and (3) Clement showed good cause for failing to serve Puckett within the statute of limitations.

HOLDING

(1) Because the delay to pursue an affirmative defense was reasonable, given the will contest five months after the estate moved to dismiss, and because the estate did not participate in the litigation process during the delay, the estate did not waive its statute of limitations defense. (2) Because all actions for assault and battery shall commence within one year after the cause of such action accrued and because no factual allegations in Puckett's complaint support a claim of negligence, Clement's claims are subject to the one-year statute of limitations. (3) Because Clement knew that Puckett was inside his house and no summons was issued with which to serve him, the trial court did not make specific findings of fact to support its possible finding of good cause. Therefore, the Supreme Court reversed and rendered the judgment of the Warren County Circuit Court.

CONCURRENCE

Presiding Justice Kitchens argued that, although the one-year statute of limitations applies to bar Clement's claim that Puckett intentionally and deliberately fired a shotgun in her direction, based on the allegations pled in Clement's complaint, Puckett's act was not so clearly intentional, and Clement had no opportunity to present evidence in support

of her claims of negligence and gross negligence. Because Clement allowed the three-year limitations period to expire, however, Justice Kitchens argued that her claims of negligence and gross negligence are barred.

Reversed & Rendered - 2016-IA-00636-SCT (Mar. 15, 2018)

En Banc Opinion by Justice Chamberlin - Concurrence by Justice Kitchens

Hon. Isadore W. Patrick Jr. (Warren County Circuit Court)

Kenneth B. Rector for Appellant - David M. Sessums for Appellee

Briefed by [Mary-Katherine Black](#)

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LOGAN V. KLAUSSNER FURNITURE CORP.

CIVIL - WORKERS' COMPENSATION

LABOR & EMPLOYMENT - WORKERS' COMPENSATION - PERMANENT-PARTIAL DISABILITY - Miss. Code Ann. § 71-3-17(c) governs permanent-partial disability compensation, and allows for compensation at the rate of sixty-six and two-thirds percent of the average weekly wages of the injured employee

LABOR & EMPLOYMENT - WORKERS' COMPENSATION - SCHEDULED MEMBERS - Miss. Code Ann. § 71-3-17 subsections (c)(1) through (c)(24) control in cases of permanent-partial disability involving the loss or loss of use of a scheduled member, such as a leg, and other specified injuries

FACTS

On October 9, 2003, Bettye Logan, then employed by Klaussner Furniture Corp. (“Klaussner”), fell at work and sustained a leg injury. At a hearing in front of the Mississippi Workers’ Compensation Commission (“Commission”), Logan testified that she worked at Klaussner as a cutter and spreader when she tripped and fell over strings of fabric. At the hearing, both Logan and Logan’s daughter, Ginnie Graham, testified that after the accident, Logan had trouble carrying out daily activities, and that Logan had to move in with Graham. Additionally, Logan’s expert testified that she had a 100% loss in the labor market, while Klaussner’s expert testified that Logan had transferable skills and remained employable. The Administrative Judge (AJ) entered an order, which found that, although there was a 4% permanent impairment to the lower left extremity, the work-related injury did not result in any industrial loss of use to Logan’s leg. Logan appealed, and the Court of Appeals reversed and remanded (*Logan I*), finding that Logan had suffered a permanent partial or total disability, and at the very least should have been awarded loss of wage-earning capacity. Per these instructions, the AJ amended its ruling to find that Logan had suffered a 60% loss of industrial use of her leg, entitling her to permanent-partial disability benefits of \$331.06 for 105 weeks. The full Commission affirmed the AJ’s decision. Logan appealed again, arguing that she was entitled to permanent-total disability benefits, and the Court of Appeals again reversed and remanded. This time, the Court of Appeals’ reasoning was based on the Commission’s alleged “erroneous misapplication of the law” with respect to Miss. Code Ann. § 71-3-17, finding that Logan’s injuries were “permanent” and resulted in a loss of wage-earning capacity. Klaussner petitioned for writ of certiorari.

ISSUE

Whether the Commission erroneously applied Miss. Code Ann. § 71-3-17(c)(2).

HOLDING

Because the Commission, following the Court of Appeals’ instructions on remand, specifically found that Logan had not suffered a total loss of wage-earning capacity, and Logan’s leg injury fell under the scheduled members listed in Miss. Code Ann. § 71-3-17(c)(1) through (c)(24), the Commission’s decision to apply Miss. Code Ann. § 71-3-17 (c)(2), which is the section that controls in cases of permanent-partial disability of scheduled members, was supported by substantial evidence. Therefore, the Supreme Court reversed the judgment of the Court of Appeals, and reinstated and affirmed the judgment of the Commission.

Reversed - 2015-CT-01760-SCT (Mar. 15, 2018)

En Banc Opinion by Presiding Justice Randolph
Mississippi Workers' Compensation Commission
Roy O. Parker & Haley Wade McIngvale II for Appellant - Amy Lee Topik & Joseph Anthony Gerache III for Appellees
Briefed by [Daniel Tankersley](#)

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MISS. DEP'T OF WILDLIFE, FISHERIES, & PARKS V. WEBB

CIVIL - WRONGFUL DEATH

APPELLATE REVIEW - BENCH TRIAL - CREDIBILITY OF WITNESSES - In a bench trial, when the trial judge sits as the finder of fact, he has the sole authority for determining the credibility of witnesses

CIVIL PROCEDURE - APPEALS - RECKLESS DISREGARD - Although reasonable minds might differ on the conclusion of whether or not the officer in question acted in reckless disregard, it is beyond the appellate court's power to disturb the findings of the trial judge if supported by substantial evidence unless findings are clearly erroneous or an erroneous legal standard was applied

TORTS - INTENTIONAL TORTS - RECKLESS DISREGARD - Reckless disregard occurs when, by considering the totality of the circumstances, the conduct involved evinces not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved

FACTS

Two Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) officers observed Donald Bernius speeding on the Tchoutacabouffa River in Harrison County. The officers ordered Bernius to move his boat to what they contended to be a safer part of the river to effect a stop, but Bernius fled in the opposite direction. Bernius's vessel collided with another vessel driven by Christopher Webb. Webb was killed in the accident. Bernius's blood-alcohol content was determined to be .25% two hours after the collision. Kathleen and Candace Webb filed suit against the MDWFP pursuant to the Mississippi Tort Claims Act, arguing that the officers had acted in reckless disregard for the safety of others. In a bench trial, the court determined the officers' testimony of the incident was not credible. Finding that the officers failed to follow MDWFP procedure and produced no legal argument to indicate the actions were acceptable or permissible, the Harrison County Circuit Court found in favor of Webb and awarded damages. However, the Mississippi Court of Appeals reversed and rendered judgment in favor of MDWFP, finding that the evidence did not demonstrate the officers had acted with reckless disregard. Webb petitioned for writ of certiorari.

ISSUE

Whether the Court of Appeals erred by failing to uphold the trial court's factual findings.

HOLDING

Because the trial court had the sole authority to determine the credibility of witnesses, and the ruling was supported by substantial evidence and not clearly erroneous, the Mississippi Court of Appeals misapplied the applicable standard of review and substituted its own findings of fact for that of the trial court. Therefore, the Supreme Court reversed the judgment of the Mississippi Court of Appeals and reinstated and affirmed the judgment of the Harrison County Circuit Court.

DISSENT

Justice Coleman argued that Webb bore the burden of proof to establish that the officers had acted in reckless disregard and that Webb failed to meet this burden at trial. Thus, the trial court's rejection of MDWFP's defense and determination that the officer's testimony was not credible and was insufficient to find in favor of Webb.

Reversed - 2015-CT-0578-SCT (Mar. 15, 2018)

En Banc Opinion by Presiding Justice Kitchens - Dissent by Justice Coleman
Hon. Lisa P. Dodson (Harrison County Circuit Court, Second Judicial Dist.)
Stephen G. Peresich & Johanna M. McMullan for Appellant - Joe Sam Owen & Robert P. Myers Jr. for Appellees

Briefed by [Marilyn Higdon](#)

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SINGING RIVER HEALTH SYS. V. VERMILYEA

CIVIL - WRONGFUL DEATH

FACILITY CUSTODY - DUTY OF CARE - BREACH - If the decedent was under the custody and control of a facility, then the facility and treating medical care providers can be held liable for a breach of the duty of care that proximately caused or contributed to the decedent's suicide

MEDICAL NEGLIGENCE - DUTY OF CARE - SUICIDE - A hospital has a duty of care to its patients to exercise reasonable care to safeguard them from known or reasonably apprehensible dangers as the patient's mental and physical conditions requires, a duty that includes guarding against a foreseeable risk of suicide by patients under the facility's care

FACTS

Teresa and Julie Vermilyea filed a complaint against Singing River Health System for the wrongful death of Randy Vermilyea. Randy Vermilyea had been admitted to the Singing River Hospital after he attempted to commit suicide by jumping off of a bridge. According to the complaint, Randy was evaluated and then released from the hospital on his own, and without hospital employees having contacted any of his family members to inform him of his suicide attempt. Within minutes of being discharged, Randy jumped to his death from a bridge on Highway 613. The complaint claimed that Singing River Health System was vicariously liable for the negligent acts and omissions of its employees. Additionally, Julie Vermilyea asserted a claim for negligent infliction of emotional distress based on her having witnessed her father's suicide after Singing River omitted informing her that he had attempted suicide earlier that day. Singing River Health System filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Miss. R. Civ. P. 12(b)(6). The trial court denied the motion to dismiss. The Singing River filed a petition for interlocutory appeal.

ISSUE

Whether the trial court erred by denying the motion to dismiss.

HOLDING

Because the facility and medical staff were on notice of Randy Vermilyea's mental condition and they discharged him without notifying any family members of his attempted suicide, the complaint presents a viable claim of medical negligence. Therefore, the Supreme Court affirmed and remanded the judgment of the Jackson County Circuit Court.

DISSENT

Justice Maxwell argued that negligent treatment alone is not sufficient to sustain a cause of action for a suicide and that Vermilyea must show that Singing River committed an intentional act leading to an irresistible impulse to commit suicide in order to prevail.

Affirmed & Remanded - 2016-IA-01096-SCT (Mar. 15, 2018)

Opinion by Presiding Justice Kitchens - Dissent by Justice Maxwell

Hon. Robert P. Krebs (Jackson County Circuit Court)

John A. Banahan, Jessica B. McNeel, Michael R. Moore, Brett K. Williams, A. Kelly Sessoms, & James E Lambert for Appellants
- Mrac L. Boutwell for Appellees

Briefed by [Jay Michael Patterson](#)

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THOMAS V. MISS. DEP'T OF CORRS.

CIVIL - STATE BOARDS & AGENCIES

SENTENCING - DISCRETIONARY POWER - TRUSTY TIME & MERITORIOUS EARNED TIME -

Since the Department of Corrections awards time off to inmates' sentences under discretionary power, inmates are not entitled to trusty time and meritorious earned time off of their sentences

SEX CRIMES - KIDNAPPING OF MINORS - PARENTAL EXCEPTION - While kidnapping of minors under the age of sixteen qualifies as a sex crime, an exception can exist if a parent kidnaps their own children and the jurisdiction observes this exception

SENTENCING - MANAGEMENT & CONTROL - DEPARTMENT OF CORRECTIONS - Though the Department of Corrections is vested with the authority and discretion for the management and control of the correctional system, the Department cannot usurp a clear direction from the court via a sentencing order

FACTS

Forrest Thomas, III pled guilty to manslaughter of Kimberly Norton and kidnapping of their two children under the age of 16. He was sentenced to serve twenty years for the manslaughter conviction and fifteen years for the kidnapping conviction in the custody of the Department of Corrections. Thomas sought judicial review of his sentence due to his meritorious earned time, and trusty status was removed from his time sheet. These times were removed based on kidnapping being a mandatory crime, with Thomas required to serve a day-for-day sentence. The Marshall County Circuit Court affirmed the Department of Corrections's decision. Thomas appealed.

ISSUES

Whether the trial court erred in (1) affirming that a parent kidnapping a child qualifies as a sex crime; (2) unlawfully transforming Mississippi's sex offender registration into a criminal penalty; and (3) allowing the Department of Corrections to run Thomas's kidnapping sentence before his manslaughter sentence despite a court directive ordering otherwise.

HOLDING

(1) Because jurisdictions have the discretion to register parents convicted of kidnapping their own children as sex offenders, Thomas's sex offender registration was valid. (2) Because the power of correctional officials to award time under certain conditions is discretionary, inmates are not entitled to time awarded. (3) Because the sentencing order clearly required Thomas to serve the manslaughter sentence before the kidnapping sentence, the Department of Corrections erred in the enforcement of Thomas's sentencing order. Therefore, the Supreme Court affirmed and remanded the judgment of the Marshall County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Presiding Justice Kitchens concurred with the majority's decision to remand to the Marshall County Circuit Court to correct the Department of Corrections's error in calculating the order of Thomas's sentence. He dissented with the majority's decision that Thomas is not entitled to trusty time and meritorious time served on his kidnapping sentence because there was no rational basis to classify Thomas as a sex offender.

Affirmed & Remanded - 2017-CP-00152-SCT (Mar. 15, 2018)

Opinion by Justice Coleman - Partial Concurrence/Dissent by Presiding Justice Kitchens

Hon. Andrew K. Howorth (Marshall County Circuit Court)

Pro se for Appellant - Darrell Clayton Baughn & Anthony Louis Schmidt Jr. (Att'y Gen. Office) for Appellees

Briefed by [Jacob Swatley](#)

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TRIPLETT V. S. HENS, INC.

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

CIVIL PROCEDURE - MOTION TO DISMISS - STANDARD OF REVIEW - A motion to dismiss under Miss. R. Civ. P. 12(b)(6) presents an issue of law, and it is reviewed de novo

CIVIL PROCEDURE - IMPERMISSIBLE DUPLICATIVE ACTION - CARPENTER TEST - A court determines if a suit violates the prohibition against duplicative action by asking whether the first suit, assuming it were final, would preclude the second suit; if the court answers in the affirmative, the suit is duplicative and cannot survive

FACTS

In early September 2012, Stacy Triplett, an employee at Southern Hens, witnessed the gruesome death of a coworker. Triplett sought medical treatment from a physician for the emotional trauma suffered. The treating physician released Triplett from work and prescribed medication and counseling sessions. Triplett claimed that Southern Hens failed to timely report the claim to the insurer, Liberty Mutual, which led to an inexcusable delay of Triplett receiving her benefits. In July 2013, Triplett filed a petition to controvert her claim with the Mississippi Workers' Compensation Commission. In August 2013, Triplett filed a motion to compel medical benefits and weekly compensation, which was awarded in October 2013 by the Judge for the Commission. Triplett had trouble collecting the scheduled benefit payments from the insurer, which led to three different lawsuits. On April 9, 2014, Triplett filed suit against Southern Hens and Liberty Mutual in the Jones County Circuit Court for alleged bad faith and gross negligence related to their failure to pay her workers' compensation benefits in a timely manner. The case was removed to federal district court where it was dismissed for failure to state a claim for relief in August 2014. On June 9, 2015, Triplett filed a second suit (*Triplett II*) against Southern Hens in Jones County Circuit Court, under a theory of liability alleging bad faith and gross negligence in failing to report her claim to Liberty Mutual in a timely manner. Triplett failed to serve Southern Hens with process within 120 days, so on December 22, 2015, Triplett filed a third lawsuit (*Triplett III*) with the same claim while her second case was still pending in the same court. On May 23, 2016 the circuit court dismissed *Triplett II*, and on July 13, 2016, the circuit court dismissed *Triplett III* after finding it violated Mississippi's duplicative litigation rule. Triplett appealed.

ISSUE

Whether the trial court erred in finding that the filing of *Triplett III* while *Triplett II* was still pending violated Mississippi's prohibition on duplicative actions.

HOLDING

Because *Triplett III* was filed against the same defendant as in *Triplett II*, in the same court as *Triplett II*, and sought the same relief sought in *Triplett II*, the Supreme Court found that under the test set forth in *Carpenter*, the first suit if it were final would preclude the second suit. Therefore, the Supreme Court affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2016-CA-01157-SCT (Mar. 15, 2018)

Opinion by Justice Ishee

Hon. Dal Williamson (Jones County Circuit Court)

Adam Frazier Thrash & Gary Dale Thrash for Appellant - Stephen J. Carmody & Christopher Ray Fontan for Appellee

Briefed by [D. Hunter V. Robertson](#)

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SUPREME COURT - CRIMINAL CASES

SUTTON V. STATE

CRIMINAL - FELONY

MISSISSIPPI CONSTITUTION - UNREASONABLE SEARCH & SEIZURE - WARRANT DESCRIPTIONS - Miss. Const. art. 3 § 23 provides that the people shall be secure in their persons, houses, and possessions from unreasonable seizure or search; no warrant shall be issued without probable cause, supported by oath or affirmation, specifically designating the place to be searched and the thing to be seized

SEARCH WARRANTS - DESCRIPTIONS - REASONABLE CERTAINTY - Descriptions in search warrants need not be positively specific and definite, but are sufficient if the places and things to be searched are designated in such a manner that the officer making the search may locate them with reasonable certainty

EXCLUSIONARY RULE - GOOD-FAITH EXCEPTION - FACIALLY DEFICIENT - The good-faith exception to the exclusionary rule does not apply if the warrant is so facially deficient in failing to particularize the place to be searched and things to be seized that the executing officers cannot reasonably presume it to be valid

FACTS

A confidential informant contacted the Washington County Sheriff's Office and told them that "stolen items" were located at 331 Muscadine Street in Greenville, Mississippi ("Muscadine house"). An Affidavit for Search Warrant was prepared, and Washington County Justice Court Judge Laverne Holmes-Carter issued a search warrant for "stolen items" in the Muscadine house. Upon executing the warrant, officers detained and searched Sedric Sutton. They recovered several pieces of evidence, including sixty pills, \$4,995 in cash, a handgun, and two digital scales. Sutton was indicted as a habitual offender for possession of a controlled substance with intent to distribute and possession of a firearm by a convicted felon. Sutton moved to suppress the evidence because the underlying facts and circumstances on which the warrant was based were unreliable and the warrant failed to sufficiently describe the property to be seized. After a review, the trial court determined that there was sufficient factual basis presented upon which the magistrate could have verified the veracity or the reliability of the confidential informant and the affidavit described the things to be seized with sufficient particularity to satisfy the Fourth Amendment. Sutton was tried before a jury where he was acquitted of possession of a firearm, but found guilty of possession with intent to distribute. Sutton appealed.

ISSUE

Whether the trial court erred in denying Sutton's motion to suppress.

HOLDING

Because the warrant was invalid due to insufficient descriptions of things to be seized, and because the exclusionary rule applied, the trial court incorrectly denied Sutton's motion to suppress. Therefore, the Supreme Court reversed and remanded the judgment of the Washington County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Presiding Justice Kitchens argued that the evidence against Sutton was insufficient to sustain a conviction in the absence of the illegally obtained evidence. According to Presiding Justice Kitchens, the correct remedy is to reverse and render.

Reversed & Remanded - 2016-KA-00816-SCT (Mar. 15, 2018)

Opinion by Justice Chamberlin - Partial Concurrence/Dissent by Presiding Justice Kitchens

Hon. Margaret Carey-McCray (Washington County Circuit Court)

Benjamin A. Suber & George T. Holmes (Pub. Def. Office) for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Maggie Vinzant](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 13, 2018

COURT OF APPEALS - POST-CONVICTION RELIEF

BOYD V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - RES JUDICATA - SUCCESSIVE PETITIONS - A person who requests post-conviction relief is obligated to place before the court all claims known to him and/or of which he should have knowledge; the failure of which results in a loss of his claims for a second successive petition

POST-CONVICTION RELIEF - GUILTY PLEA - WAIVER - A knowing and voluntary guilty plea waives certain constitutional rights, among them, the privilege against self-incrimination and the right to confront and cross-examine the State's witnesses

POST-CONVICTION RELIEF - PROCEDURAL BARS - FUNDAMENTAL RIGHTS EXCEPTIONS - Errors affecting fundamental constitutional rights are excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act

FACTS

Dean Boyd pled guilty in April 2011 to statutory rape of a child under the age of fourteen. He was sentenced to twenty-five years in state prison. After two unsuccessful motions for post-conviction relief, Boyd filed a third motion for post-conviction relief in April 2016 asserting that there is no factual basis for his guilty plea, that the trial court failed to advise him of his rights, and that he received ineffective assistance of counsel. The trial court dismissed Boyd's motion finding it procedurally barred. Boyd appealed.

ISSUES

Whether the circuit court erred by (1) failing to find Boyd's indictment defective; (2) failing to find Boyd's guilty plea invalid; (3) failing to find Boyd was not advised of his rights to confront witnesses and against self-incrimination; and (4) failing to find ineffective assistance of counsel.

HOLDING

(1) Because the movant has the obligation to place all claims that are known to him before the court, and because the circuit court had already addressed the issue of Boyd's indictment, the circuit court did not err by failing to find his indictment defective. (2) Because the movant carries the burden of demonstrating a guilty plea is not knowingly and voluntarily entered, and because Boyd admitted to all relevant facts when pleading guilty, the circuit court did not err by failing to find his guilty plea valid. (3) Because a knowing and voluntary guilty plea waives the right against self-incrimination and the right to confront the State's witnesses, and because Boyd acknowledged the waiver of those rights in his petition to plead guilty, the circuit court did not err by failing to find Boyd was not advised of those rights. (4) Because ineffective assistance of counsel may only be shown by facts demonstrating that competent counsel would have ensured a different result, and because Boyd raised no constitutional issue to except his motions from the procedural bars, the circuit court did not err by failing to find ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Leake County Circuit Court.

Affirmed - 2017-CP-00058-COA (Mar. 13, 2018)

Opinion by Judge Barnes

Hon. Vernon R. Cotten (Leake County Circuit Court)

Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [D. Kirkwood Palmer](#)

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CLAVERIE V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SENTENCE REVOCATION - DISMISSAL - A circuit court may dismiss a PCR motion without an evidentiary hearing where it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case that the movant is not entitled to any relief

POST-RELEASE SUPERVISION - ACQUITTAL - PAROLE REVOCATION - Even when a parolee is acquitted in a criminal proceeding, this does not per se preclude parole revocation predicated upon facts and circumstances giving rise to the criminal charge

POST-RELEASE SUPERVISION - PROBATION REVOCATION - EVIDENTIARY STANDARD - If a court finds by a preponderance of the evidence that a person under post-release supervision has committed a felony or absconded, the court may revoke his probation and impose any or all of the sentence

POST-CONVICTION RELIEF - SENTENCE REVOCATION - TECHNICAL VIOLATION - Pursuant to Miss. Code Ann. § 47-7-37(5)(a), if the court revokes probation for a technical violation, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety days for the first technical violation and not to exceed one hundred twenty days for the second technical violation; for the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty days or the court may impose the remainder of the suspended portion of the sentence; for the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence

FACTS

In September 2013, Todd Claverie was sentenced to fifteen years, suspended for time served and three years of post-release supervision (PRS), for possession of marijuana with the intent to transfer or distribute. The PRS conditions included not committing any other offenses, reporting monthly to his supervising officer, and paying supervision fees and court costs. Two years later, in January 2015, Claverie was arrested and charged with sexually battering his stepdaughter. A PRS revocation petition was entered claiming Claverie violated four terms of his PRS: (1) he was charged with sexual battery of a minor; (2) he missed reporting for four months; (3) he was \$160 in arrears for supervising fees; and (4) he still had a balance of over \$400 in court fees. The circuit court found that conditions were met for the revocation of PRS. After Claverie's sexual battery trial, he was found guilty for intimidation but acquitted for sexual battery. Claverie then entered a PCR motion in January 2017 claiming that because his PRS was rescinded based on the sexual battery charge, it should be reinstated because he was acquitted. The circuit court denied Claverie's PCR motion on the basis that, even without the sexual battery charge, Claverie still violated several conditions of his PRS. Claverie appealed.

ISSUES

Whether (1) Claverie's PRS should be reinstated because he was acquitted of the sexual battery felony that served, in part, as the basis for the State's revocation petition; and (2) the circuit court exceeded its authority under § 47-7-37(5) when it imposed the full remainder of the suspended portion of Claverie's sentence at the revocation hearing.

HOLDING

(1) Because of the ten-count indictment, the evidence provided by Sergeant McElwain at the revocation hearing, and the subsequent related felony convictions, the circuit court's determination that Claverie violated a condition of his PRS order by committing other offenses was not in error. Additionally, Claverie was convicted of two counts of witness tampering and one count of intimidating a witness, which arose out of the same facts and circumstances as Claverie's sexual battery against his stepdaughter and directly relate to that charge, and further demonstrate that reasonable grounds outside of Claverie's sexual-battery charge exist to support revoking his PRS. Further, there was ample evidence to support that the other three violations of the PRS agreement (reporting, payment of supervising fees, and payment of court costs) occurred as well. (2) Because Claverie did not raise the issue of exceeded authority under § 47-7-37(5), he waived this claim on appeal. Additionally, the argument lacks merit because there was sufficient record evidence to support the circuit court's determination that Claverie violated the condition requiring that he not commit any state or federal offense. Further, because Claverie violated three other conditions of his PRS, he committed three technical violations. The circuit court was therefore within its authority to impose the remainder of the suspended portion of Claverie's sentence under § 47-7-37(5)(b). Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2017-CP-00433-COA (Mar. 13, 2018)

Opinion by Judge Carlton

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

Pro se for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee
Briefed by [Nikki Breeland](#)

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GAULDEN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - MOTION FOR RELIEF - Under the Uniform Post-Conviction Collateral Relief Act, a post-conviction relief motion following a guilty plea must be filed within three years after the judgment of conviction is entered

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FUNDAMENTAL RIGHTS EXCEPTIONS - Only four types of fundamental rights have been expressly found to survive PCR procedural bars: (1) the right against double jeopardy; (2) the right to be free from an illegal sentence; (3) the right to due process at sentencing; and (4) the right not to be subject to ex post facto laws

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - EXCEPTIONS TO PROCEDURAL BAR - The Mississippi Supreme Court has held that ineffective-counsel and involuntary-guilty-plea claims are not valid exceptions to PCR procedural bars; therefore, even though these claims involve fundamental constitutional rights, the procedural bars are applicable

FACTS

On June 12, 2013, John Frank Gaulden pled guilty to two counts of unlawful possession of a motor vehicle and one count of aggravated assault of a jailer. The circuit court entered its sentencing order on the same day as Gaulden’s guilty pleas. On November 7, 2016, Gaulden filed a motion for post-conviction relief. Upon review, the circuit court summarily dismissed Gaulden’s motion because it was time-barred and no exceptions to the three-year limitations period applied. Gaulden appealed.

ISSUES

Whether (1) Gaulden’s PCR motion was time-barred; (2) Gaulden’s ineffective-counsel and involuntary-guilty-plea claims were excepted from the three-year limitations period; and (3) Gaulden’s claim that the multi-count bill of criminal information was incorrect was procedurally time-barred.

HOLDING

(1) Because Gaulden’s motion for post-conviction relief was filed more than three years after his conviction, Gaulden’s claim was procedurally time-barred. (2) Because motions for post-conviction relief based on involuntary-guilty-plea and ineffective-counsel claims were not excepted from the three-year limitation period, Gaulden’s claims were procedurally time-barred. (3) Because motions for post-conviction relief based on claims that the bill of information was defective were not excepted from the three-year limitation period, Gaulden’s claim was procedurally time-barred. Therefore, the Court of Appeals affirmed the judgment of the Amite County Circuit Court.

Affirmed - 2017-CP-00378-COA (Mar. 13, 2018)

Opinion by Judge Carlton

Hon. Forrest A. Johnson Jr. (Amite County Circuit Court)

Pro se for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [William L. Moorer](#)

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BENDER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - To prove a claim of ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and prejudiced his defense

CRIMINAL PROCEDURE - SENTENCING - ANALYSIS - Courts will not engage in analyzing a sentencing order unless it is considered constitutionally disproportionate or not within the statutory limits

CRIMINAL PROCEDURE - INDICTMENT - ESSENTIAL ELEMENTS - An indictment must contain the essential facts constituting the offense charged and fully notify the defendant of the nature and cause of the accusation

FACTS

Julius Bender was indicted on one count of possession of a firearm by a convicted felon. After a jury trial, Bender was sentenced as a non-violent habitual offender to ten years in the custody of the Mississippi Department of Corrections. Bender filed for a judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial. The circuit court denied his motion. Bender appealed.

ISSUES

Whether (1) Bender received ineffective assistance of counsel; (2) the sufficiency and weight of the evidence was enough to deny Bender's JNOV motion; (3) Bender was excessively sentenced under the applicable statute; (4) all exhibits and the record as a whole supported overturning Bender's conviction; (5) prosecutorial misconduct affected the outcome of Bender's trial; and (6) Bender's indictment was sufficient.

HOLDING

(1) Because Bender did not explain exactly how or why his trial counsel was allegedly ineffective, his claim was dismissed without prejudice. (2) Because reasonable and fair-minded jurors could have found Bender guilty, the evidence was sufficient to overrule his motion for JNOV. Further, because Bender testified to both pleading guilty to a felony crime in 1997 and to purchasing a gun in 2007, the verdict did not sanction an unconscionable injustice. (3) Because the sentence of ten years was within the statutory limit, Bender was not excessively sentenced. (4) Because Bender did not assert any legal authority to support his claim that the record supported overturning his conviction, his claim was procedurally barred. (5) Because Bender failed to assert any facts or legal authority to support his claim of prosecutorial misconduct, his claim was procedurally barred. (6) Because Bender did not explain how the indictment was allegedly insufficient, there was no error in the indictment. Therefore, the Court of Appeals affirmed the judgment of the Jasper County Circuit Court.

Affirmed - 2017-KA-00436-COA (Mar. 13, 2018)

Opinion by Judge Westbrook

Hon. Eddie H. Bowen (Jasper County Circuit Court, Second Judicial Dist.)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Billy L. Gore (Att'y. Gen. Office) for Appellee

Briefed by [Luke Kelly](#)

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FONTAINE V. STATE

CRIMINAL - FELONY

EVIDENCE - EXCERPT OF RECORDED STATEMENT - PRESERVATION FOR APPEAL - If part of a recorded statement is played at trial, the defendant must proffer the remaining contents of the statement in order to preserve the issue for appeal

EVIDENCE - HEARSAY EXCEPTIONS - UNAVAILABILITY OF DECLARANT - Miss. R. Eiv. 804(a)(4) explains that a declarant is unavailable when he cannot be present or testify at the trial because of death, and the proponent may use the declarant's testimony if the statement clearly and directly implicates the declarant in criminal conduct

CRIMINAL PROCEDURE - ALIBI DEFENSE - NOTICE REQUIREMENT - Under Mississippi Uniform Rule of Circuit & County Court 9.05 (now, Miss. R. Crim. P. 17.4), a defendant must serve upon the prosecution a written notice of intent to use an alibi defense within ten days of a written demand by the prosecuting attorney

EVIDENCE - VERDICTS - LEGAL SUFFICIENCY - The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

FACTS

On June 23, 2010, Petal Police responded to a burglary call to a local trailer park. Upon arrival, the officers to the call spoke with William Cooley, who explained that his trailer had been burglarized. After receiving information that the stolen goods might be in another trailer in the same park, the officers searched the trailer with the consent of its owner, Mark Walker. Andrea McDaniel, Walker's girlfriend, and Michael Fontaine, Walker's co-worker, were both present during the search. The officers found several items reported as stolen. After reading Fontaine his Miranda rights, he was placed into police custody. Fontaine provided a written statement detailing his whereabouts on the day of the burglary. He claimed that he got home from work and took a bath around 3:30 p.m., saw Walker carrying "a basket of something," then took a nap until 4:30 a.m. and went to work. In May 2011, a grand jury indicted Fontaine as a habitual offender. Several days before the trial, Fontaine filed a notice of intent to introduce as evidence an affidavit from Walker, who had recently died. Walker denied that Fontaine was present when the burglary occurred and claims that he was the only person in Cooley's trailer. The circuit court found the affidavit was hearsay and untimely, and excluded the affidavit from evidence. McDaniel testified that she discussed taking things from Cooley's trailer with Walker and Fontaine. The circuit court allowed a two-minute interview taken prior to trial between Fontaine and a polygrapher retained by the defense counsel. The conversation included an explanation of Fontaine's whereabouts on the day of the alleged burglary, where Fontaine explains that his wife was interested in looking at Cooley's trailer. The jury also heard testimony from Kimberley Cooley, the co-owner of the burglarized trailer, who testified that she recently overheard a conversation between Fontaine and his bail bondsman, in which Fontaine explained that he had Cooley's permission to enter the trailer. She testified that neither she nor her husband ever gave permission to Fontaine, Walker, or McDaniel to enter their trailer. After considering the evidence, the jury found Fontaine guilty of both burglary of a nonresidential dwelling and conspiracy to commit burglary of a nonresidential dwelling. Fontaine moved for a judgment notwithstanding the verdict, or in the alternative, a new trial. Both were denied. Fontaine appealed.

ISSUES

Whether (1) the circuit court erred by not allowing the full audio-recorded polygraph interview to be played when the State played a two-minute excerpt; (2) the circuit court erred by excluding the affidavit of a deceased co-defendant; (3) prosecutorial misconduct denied Fontaine a fair trial; (4) insufficient evidence supported the verdicts; and (5) the verdicts were against the overwhelming weight of the evidence.

HOLDING

(1) Because Fontaine failed to proffer the remaining contents of the audio-recorded polygraph interview, he waived the issue on appeal. (2) Because Walker's affidavit was both hearsay testimony and untimely noticed, the circuit court did not err in excluding the affidavit. Furthermore, because Fontaine failed to offer the notice of intent to use Walker's affidavit within the 10-day notice requirement set out in Mississippi Uniform Rule of Circuit & County Court 9.05, the circuit court did not abuse its discretion in finding that Fontaine's notice of intent to use Walker's affidavit was untimely. (3) Because it was unclear if the State promised McDaniel anything in return for her testimony against Fontaine, prosecutorial misconduct did not occur during the State's closing arguments. Furthermore, because the State withdrew its statement at issue in closing argument, this does not rise to the level of prosecutorial misconduct. (4) Because it is within the discretion of the jury to accept or reject testimony by a witness, and the jury may give consideration to all inferences flowing from the testimony, the evidence presented at trial was legally sufficient to support the verdicts. Although the testimony of McDaniel and Fontaine was conflicting, the jury was entitled to believe whoever they found to be most credible. (5) Because conflicting portions of McDaniel's testimony were thoroughly presented to the jury

and the jury concluded that Fontaine was guilty beyond a reasonable doubt of both conspiracy and burglary of a nonresidential dwelling, the jury's verdicts were not against the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

DISSENT

Judge Carlton argued Fontaine was entitled to have the remainder of his recorded statement about the offenses admitted into evidence after the State introduced an excerpt of the taped statement. It is a general rule that where the State introduces evidence of statements made by the defendant immediately after a crime, the defendant is entitled to bring out the whole of his statement. For this reason, Judge Carlton would reverse Fontaine's convictions and remand the case for further proceedings.

Affirmed - 2015-KA-00719-COA (Mar. 13, 2018)

En Banc Opinion by Judge Greenlee - Dissent by Judge Carlton

Hon. Robert B. Helfrich (Forest County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Joseph Scott Hemleben (Att'y Gen. Office) for Appellee

Briefed by [Caroline Loveless](#)

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LEWIS V. STATE

CRIMINAL - FELONY

JURY SELECTION - PEREMPTORY STRIKES - *BATSON* CHALLENGE - Peremptory strikes may not be used for the purpose of striking jurors based solely on their race or gender

JURY SELECTION - *BATSON* CHALLENGE - PRIMA FACIE CASE - The defendant must produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred

FACTS

On December 16, 2014, narcotics detectives with the Gulfport Police Department were making a routine patrol. The detectives observed Walter Lewis toss a green pill container on the ground, which contained approximately one gram of cocaine. At trial, during jury selection, the defense raised a *Batson* challenge after the State used its first two peremptory strikes against African-American women. The State responded that it had already accepted one female African-American juror, whom the defense mistakenly thought was white. The trial judge ruled the defense had not made a prima facie case that the peremptory strikes were for discriminatory purpose. After jury selection, the defendant never renewed his *Batson* objection. The jury ultimately contained three African-American females and one Hispanic male. Lewis was convicted of one count of possession of cocaine and sentenced to six years in the Mississippi Department of Corrections as both a habitual and subsequent offender. Lewis filed a post-trial motion for a new trial, or, alternatively, a judgment notwithstanding the verdict. Lewis raised multiple issues, including the *Batson* issue, but the trial court denied his motion. Lewis appealed.

ISSUE

Whether the trial court used an incorrect legal standard in denying Lewis's *Batson* challenge during jury selection.

HOLDING

Because the State's striking of two African-American females did not demonstrate a pattern of discrimination, Lewis failed to establish a prima facie case. Further, the trial judge's mention of an African-American already seated on the jury did not indicate that an improper legal standard was applied. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-KA-01712-COA (Mar. 13, 2018)

Opinion by Judge Barnes

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, First Judicial Dist.)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee
Briefed by [Sarah Raben](#)

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WILSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - NEW TRIAL - NEWLY DISCOVERED EVIDENCE - A movant seeking a new trial based on newly discovered evidence must show that: (1) the new evidence was discovered after the trial; (2) it could not by due diligence have been discovered prior to trial; (3) it is material to the issue and not merely cumulative or impeaching; and (4) the new evidence will probably produce a different result or verdict in the new trial

CRIMINAL PROCEDURE - NEW TRIAL - WITNESS TESTIMONY - A witness changing their testimony after the trial is not alone adequate grounds for granting a new trial

FACTS

Danny Wilson was found guilty of first-degree murder in the death of Roviell Mays and was sentenced to the custody of the Mississippi Department of Corrections (MDOC).. Upon conviction, Wilson filed a motion for a new trial asserting numerous assignments of error, including that there was new evidence in the case. He attached an affidavit from a female eyewitness who was in the car with Mays when they arrived at Marquis and Natasha Shaw’s house, stating that Mays had a gun in his pants when he walked up to Wilson’s car, and Mays hit Wilson in the side of his head. A hearing was held on November 24, 2015. The female eyewitness testified that Mays had his hand in his pants as if he had a gun and that Mays used the gun to hit Wilson. Wilson’s grandmother testified that Mays had threatened Wilson’s life on several occasions before the shooting. A statement was also given by Jason Curtis, which stated that Mays carried a gun “at all times that.” The trial court denied Wilson’s motion for a new trial. Wilson appealed.

ISSUE

Whether the trial court should have granted Wilson a new trial based on the newly discovered evidence that Mays was carrying a weapon.

HOLDING

Because newly discovered evidence is not grounds for a new trial if known prior to trial, reasonably discoverable at the time of trial, or merely cumulative, and because the testimony from Wilson’s grandmother and the female eyewitness was known prior to trial, the trial court did not err in denying Wilson’s motion for a new trial. Further, because the testimony of the two additional witnesses would not have changed the result, the trial court did not abuse its discretion in denying Wilson’s motion for a new trial. Therefore, the Court of Appeals affirmed the judgment of the Claiborne County Circuit Court.

Affirmed - 2016-KA-00053-COA (Mar. 13, 2018)

Opinion by Judge Barnes

Hon. Lamar Pickard (Claiborne County Circuit Court)

Cynthia Ann Stewart for Appellant - Katy Taylor Gerber (Att’y Gen. Office) for Appellee

Briefed by [Michael Farese](#)

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